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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 457.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a Corporation), *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

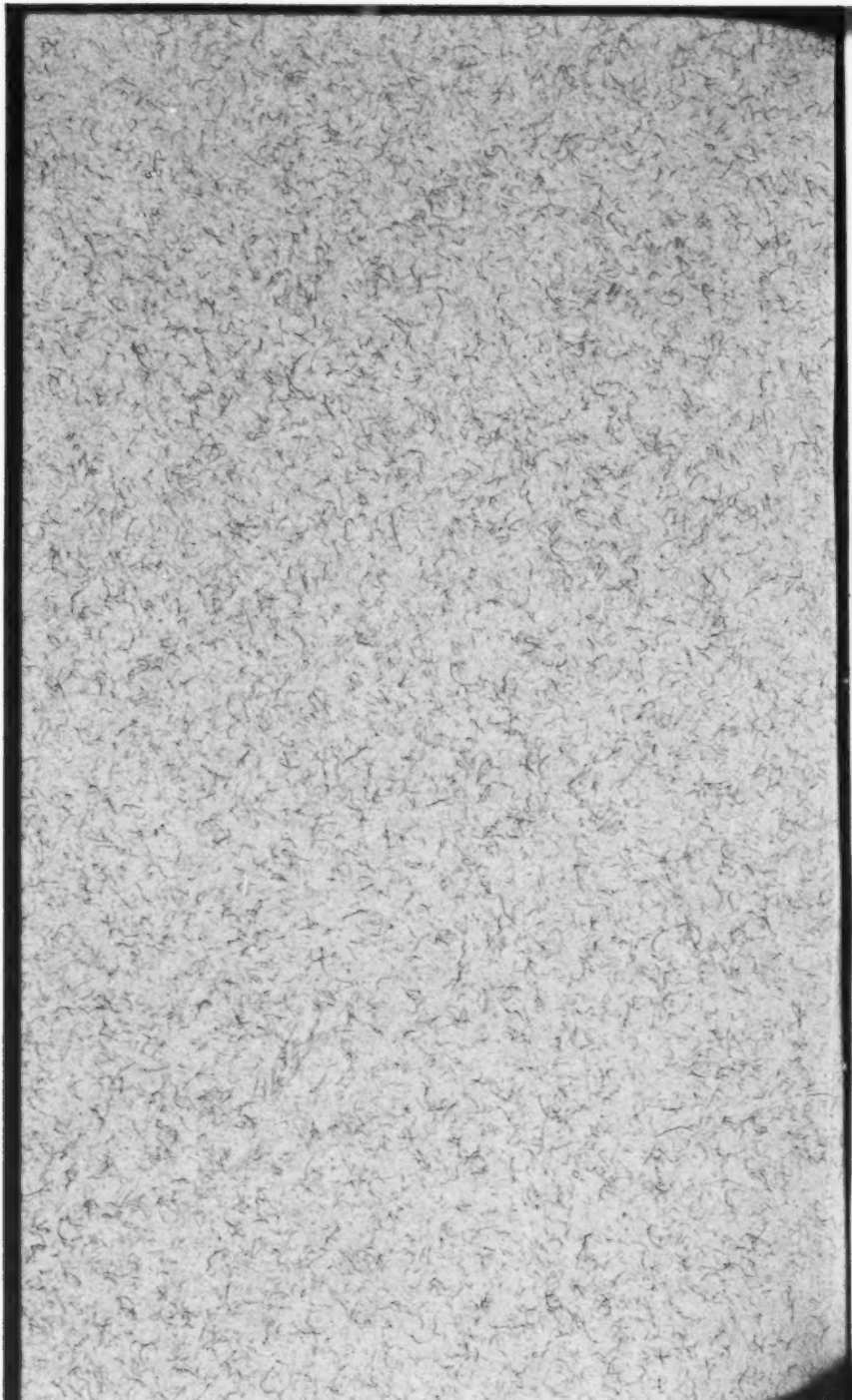
PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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Dated: December, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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The Government's brief in opposition clarifies the issue in this case. It flatly takes the position that punishment by jail sentence for criminal contempt of an injunction under the Food and Drug Act does not require any showing that the violation was intentional or wilful. The rule which the Government seeks to sustain is stated on page 11 of its brief as follows:

> "Colgrove did that which he deliberately intended to do. He relied upon his own judgment as to the scope of the decree and assumed a calculated risk that the advertisements would not constitute a violation. *In making his private determination as to the scope and*

> *effect of the injunction, he acted at his peril.* It is a well-recognized rule of criminal law that every man is presumed to intend the legitimate consequences of his own act. *Wrongful* acts knowingly or intentionally committed can neither be justified nor excused *on the ground of innocent intent.*" [Emphasis supplied]

The Government does not cite a single case where a person was ever punished for criminal contempt without pleading and proof of wilfulness. Its citations are exclusively cases of civil contempt.[1] The position which it takes as pointed out on pages 13 and 14 of our petition is directly contrary to the position of this Court in *Wilson* v. *State of North Carolina,* 169 U. S. 586, and of the Seventh Circuit in *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.,* 163 F. 2d 168 (C.C.A. 7, 1947).

It is also contrary to the principles expressed in *Michaelson* v. *U. S.,* 266 U. S. 42, 66, and *Gompers* v. *Buck's Stove & Range Company,* 221 U. S. 418. In both of these cases criminal contempt is treated as a crime requiring for its proof all of the elements of a crime beyond a reasonable doubt. The crime here, of course, can only be defiance of the court. It is impossible for anyone to act in defiance of the court without a deliberate intention to do so. This means the court order must be knowingly flouted by the defendant in order to make a criminal case.

The Government's statement (Br. p. 13) "that the good faith or intent of the defendant may serve only in mitigation of the penalty and not as a defense" might apply if the defendant here had knowingly flouted the order. In such a case belief on the part of the defendant that he was justified in disobeying the court could only go to mitigation. But here there is not a scintilla of evidence that the defendant knew he was disobeying the court. And so the Government is driven to the extreme position that con-

[1] The only possible exception is a Tennessee District Court case involving a labor injunction. *U. S.* v. *Sanders,* 290 Fed. 428 (W. D. Tenn., 1923) where it is difficult to determine whether the court thought it was dealing with civil or criminal contempt.

scious disobedience is not required in criminal contempt on the theory that the defendant acted at his peril in construing the injunction. Such a definition of the offense of criminal contempt expands the contempt power of the federal courts beyond any case that has been heretofore decided. It is urged here by the Government without any supporting precedent whatever.

The Government, perhaps realizing the novelty and injustice of the rule it attempts to support, inserts in its brief a few statements to give the impression that the defendant knew he was disobeying the court. For example, on page 5 of its brief we find the following which is typical:

> "In 1945 petitioners resorted to the scheme of failing to mention in the labeling of the oil any of the ailments or diseases for which it was prescribed or recommended (R. 23, 89-90)."

The record reference is not to the testimony but to the portion of the opinion of the Court of Appeals referring to other cases in which the defendant was involved which are not before us here. There is no support whatever for any of the statements in the Government's brief inferring deliberate disobedience of the court. The only "scheme" of the defendant was an attempt to stay in business and comply with the law. This is corroborated by the fact that the Government does not suggest any conceivable advantage to the defendant in interpreting the injunction the way he did. Had he followed the interpretation which the court later put upon it, the difference in the advertisement or the label would have been so small as to have escaped notice. Certainly in order to spell out a deliberate scheme of disobedience by inference some rational purpose for the disobedience must be shown.

THE APPLICABLE SECTION.

The Government claims that the information was brought under Section 385 of 28 U. S. C. This is not correct. As the information itself states, the information was

brought under Sections 332(b) of 21 U. S. C. and 387 of 28 U. S. C. (R. 2). Section 332(b) of 21 U. S. C. is the applicable section of the Food and Drug Act. Section 387 of 28 U. S. C. outlines the procedure to be followed. Petitioners concede that Section 386 of 28 U. S. C. relied on in their petition is not directly applicable. But this makes no difference in the result. The reason that Section 386 is not applicable is because Section 389 exempts from its scope suits in the name of or on behalf of the United States. But in making that exemption Section 389 specifically provides that suits in the name of the United States "and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914." These usages as shown by the cases which we cite require wilful disobedience of an order to justify criminal punishment for contempt. It is unthinkable that the rule could be otherwise.

Section 385, which the Government now claims is the applicable section instead of the section cited in the information, is simply a general grant of jurisdiction of federal courts to punish by fine or imprisonment contempts of their authority. The section severely limits that power restricting it to misbehavior in the presence of the court, misbehavior of officers of the court in their official transactions and disobedience or resistance to the commands of the court. It does not, as the Government seems to think, change the definition of criminal disobedience by eliminating the requirement of deliberate intention to disobey.

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